RECORD AND BRIEFS

No. 16-111

Supreme Court, U.S.
FILED
OCT 25 2017
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., et al.,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, et al.,

Respondents.

On A Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF EQUALITY IN SUPPORT OF RESPONDENTS

KYLE C. VELTE
Visiting Assistant Professor,
TEXAS TECH UNIVERSITY
SCHOOL OF LAW
3311 18th Street,
Box 40004
Lubbock, TX 79409
(806) 834-5470
kyle.velte@ttu.edu
Counsel of Record

BARBARA J. COX
Professor of Law,
CALIFORNIA WESTERN
SCHOOL OF LAW
225 Cedar Street
San Diego, CA 92101

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. What's Old is New Again: Opponents Attempt to Revive Rejected Arguments 3

A. The Early Years (1950s through 1970s): Expressly Homophobic Rhetoric, Expressly Homophobic Laws 3

B. The Middle Years (1980 through 1992): Sodomy is Conduct Separate from Status 5

C. The Marriage Equality Years (1993 through 2015): Children Take Center Stage 7

D. Today: Marriage is Separate from LGBT Status 9

E. Opponents Are Attempting Preservation-Through-Transformation 13

II. This Court Should Break the Preservation-Through-Transformation Dynamic 14

A. This Court's Precedents Require Rejecting the Status-Conduct Distinction 15

B. The Social-Identity Basis for Rejecting the Status-Conduct Distinction 17

TABLE OF CONTENTS – Continued

Page

C. This Court Should Break the Preservation-Through-Transformation Dynamic by Rejecting the Status-Conduct Distinction 19

CONCLUSION 20

APPENDIX

List of personal and professional donors who made a monetary contribution for the printing of this *amicus* brief ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Barrett v. Fontbonne Acad., No. CV-2014-751, 2015 WL 9682042 (Mass. Super. Dec. 16, 2015) (unpublished opinion) 18

Bowers v. Hardwick, 478 U.S. 186 (1986) 6

Brush & Nib. Studio, L.C. v. City of Phoenix, No. CV-2016-052251 (Ariz. Sup. Ct. May 12, 2016) 10, 11

CLS v. Martinez, 561 U.S. 661 (2010) 16

Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015) 18

Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) 11, 18

Gifford v. McCarthy, 23 N.Y.S.3d 422 (App. Div. 2016) 18

In re Marriage Cases, 183 P.3d 384 (Cal. 2008) 8

Lawrence v. Texas, 539 U.S. 558 (2003) 14, 15, 16

Lexington Fayette Urban Cty. Hum. Rgts. Comm'n v. Hands on Originals, Inc., HRC #03-12-3135 (Lexington-Fayette Hum. Rgts. Comm'n Apr. 19, 2012) 10

Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015) 2, 9, 10, 16, 17

Romer v. Evans, 517 U.S. 620 (1996) 15, 16

State v. Arlene's Flowers, 389 P.3d 543 (Wash. 2017) 11, 18

TABLE OF AUTHORITIES – Continued

Page

Telescope Media Group v. Lindsey, No. 0:16-cv-04094, 2017 WL 4179899 (D. Minn. Dec. 6, 2016) 10

United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013) 9, 10, 16

COURT DOCUMENTS

Amici Curiae Brief of Individual Tennessee Legislators, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 3:13-cv-01159), 2014 WL 2154837 9

Amicus Curiae Brief of Citizens for Community, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 1:13-cv-501), 2014 WL 1653834 9

Amicus Curiae Brief of Manhattan Declaration, *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 390995 9

Brief Amicus Curiae of the Beckett Fund for Religious Liberty in Support of Petitioners, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, No. 16-111 (U.S. 2017), 2017 WL 4004526 12

Appellant Proposition 22 Legal Defense and Education Fund's Opening Brief, *In Re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. CPF-04-503943), 2005 WL 3955027 8

TABLE OF AUTHORITIES – Continued

Page

Brief Amicus Curiae of the Family Research Council, *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 315235 9

Brief of Amici Curiae Indiana Family Institute, Inc., Indiana Family Action, Inc., and The American Family Ass'n of Indiana, Inc., *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, No. 16-111 (U.S. 2017), 2017 WL 3913765 12

Brief of Amici Curiae Legal Scholars in Support of Equality and Religious and Expressive Freedom in Support of Appellants, *State v. Arlene's Flowers*, 389 P.3d 543 (Wash. 2017) (No. 91615-2), 2016 WL 6126873 11

Brief of Amicus Curiae Christian Business Owners, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, No. 16-111 (U.S. 2017), 2017 WL 4005666 12

Brief of Amicus Curiae the Family Trust Foundation of Kentucky, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 3:13-cv-00750), 2014 WL 2154833 9

Brief of Amicus Curiae Foundation for Moral Law, *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1519044 9

Brief of Amicus Curiae Liberty Counsel, *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 390994 9

TABLE OF AUTHORITIES – Continued

Page

Brief of Amicus Curiae Liberty Counsel, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, No. 16-111 (U.S. 2017), 2017 WL 4005663 12

Brief of Amicus Curiae State of Alabama, *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1534344 9

Brief of Petitioner, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667939 6

Brief for Petitioners, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, No. 16-111 (U.S. 2017), 2017 WL 3913762 11

Brief of the Rutherford Institute et al. as Amici Curiae Supporting Petitioner, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667943 6

Petitioners' Reply Brief, *Klein v. Oregon Bureau of Labor and Industries* (Nos. 44-14, 45-14) (Or. App. 2016), 2016 WL 8465675 11

LAW REVIEW ARTICLES AND BOOK CHAPTERS

Charles J. Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debates Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841 (1998) 7

Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993) 7

TABLE OF AUTHORITIES – Continued

Page

Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993) 17

FREDERICK CLARKSON, POLITICAL RESEARCH ASSOC., WHEN EXEMPTION IS THE RULE: THE RELIGIOUS FREEDOM STRATEGY OF THE CHRISTIAN RIGHT (2016), *available at* http://www.politicalresearch.org/wp-content/uploads/2016/01/When-Exemption-is-the-Rule-PRA-Report.pdf 2

Scott L. Cummings and Douglas NeJaime, *Lawyering for Marriage Equality*, 57 U.C.L.A. L. REV. 1235 (2010) 7

Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 KY. L. J. 885 (2000-2001) 7

Max Kanin, Christian Legal Society v. Martinez: *How an Obscure First Amendment Case Inadvertently and Unexpectedly Created a Significant Fourteenth Amendment Advance for LGBT Rights Advocates*, 19 AM. U.J. GENDER SOC. POL'Y & L. 1317 (2011) 15, 16

Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEXUALITY 1 (2003) 17

Janet E. Halley, *"Like Race" Arguments, in* WHAT'S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY (Judith Butler et al. eds. 2000) 18

TABLE OF AUTHORITIES – Continued

Page

DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT (1997) 4, 5

Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271 (2006) 17

Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169 (2012) 7, 17

Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) 2, 10, 13, 14, 19

Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenge to Anti-Discrimination Statutes*, 49 CONN. L. REV. 1 (2016) 1

Kyle C. Velte, *Fueling the Terrorist Fires with the First Amendment: Religious Freedom, the Anti-LGBT Right, and Interest Convergence Theory*, 82 BROOKLYN L. REV. 1109 (2017) 1, 3, 4

Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 36 LAW & INEQUALITY ___ (forthcoming 2018) 1

Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) 17

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

A History of Gay Rights in America, CBS NEWS, *available at* http://www.cbsnews.com/pictures/a-history-of-gay-rights-in-america/6/ 4

Molly Ball, *The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality*, THE ATLANTIC (Dec. 11, 2012), *available at* https://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865// 8

Anita Bryant and the Save Our Children Campaign, GAY HISTORY, *available at* http://gayhistory4u.blogspot.com/2009/08/religious-right-has-been-on-attack.html 5

"Employment of Homosexuals and Other Sex Perverts in Government" (1950), FRONTLINE, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/assault/context/employment.html 4

Getting Rid of Sodomy Laws, *available at* https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision 5

GLAAD Media Reference Guide – Terms to Avoid, GLAAD, *available at* http://www.glaad.org/reference/offensive 4

TABLE OF AUTHORITIES – Continued

Page

Susan Donaldson James, *Lavender Scare: U.S. Fired 5,000 Gays in 1953 'Witch Hunt'*, ABC NEWS (Mar. 5. 2012), *available at* http://abcnews.go.com/Health/lavender-scare-us-fired-thousands-gays-infamous-chapter/story?id=15848947 4

Southern Poverty Law Center, *History of the Anti-Gay Movement Since 1977*, *available at* https://www.splcenter.org/fighting-hate/intelligence-report/2005/history-anti-gay-movement-1977 5

This Day in History: 1969 The Stonewall Riot, HISTORY.COM, *availalbe at* http://www.history.com/this-day-in-history/the-stonewall-riot.....4

Williams Institute, Chapter 5: The Legacy of State Laws, Policies, and Practices, 1945-Present, *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/5_History.pdf (last visited Sept. 20, 2017).....7

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who focus on LGBT rights, antidiscrimination law, and equal protection in their scholarship and practice. Kyle C. Velte is the author of several law review articles about the issues presented in this case, including a forthcoming article on which this brief is based.[2]

SUMMARY OF ARGUMENT

While Petitioners' claims are grounded in the First Amendment, this brief highlights a secondary argument, one that might appear new after *Obergefell v.*

---

[1] Petitioners and Respondent Colorado Civil Rights Commission have filed blanket consents to the filing of *amicus* briefs. *Amici* requested and received consent from individual Respondents Charlie Craig and David Mullins. Counsel for a party has not authored the brief in whole or in part; nor has such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. The printing costs for this brief have been paid by *amici* and by donations from personal and professional friends of *amici*, none of whom are counsel for any party, and who are listed in Appendix A.

[2] *See* Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 36 LAW & INEQUALITY ___ (forthcoming 2018); *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041377). *See also* Kyle C. Velte, *Fueling the Terrorist Fires with the First Amendment: Religious Freedom, the Anti-LGBT Right, and Interest Convergence Theory*, 82 BROOKLYN L. REV. 1109 (2017); Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenge to Anti-Discrimination Statutes*, 49 CONN. L. REV. 1 (2016).

Hodges,[3] but is nothing more than a modernized version of an argument long rejected by this Court: the status-conduct argument. As deployed in this case, it is an example of "transformation-through-preservation" – a dynamic through which a group opposing civil rights reform modernizes its rhetoric after a civil rights victory to attempt to maintain unequal status regimes.[4]

Opponents of LGBT equality ("Opponents"),[5] including Petitioners, have launched a coordinated, national campaign to resist further civil rights gains for the LGBT community. Opponents employ two tactics to maintain an anti-LGBT status regime. The first is a

---

[3] *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015).

[4] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178 (1996). This dynamic has played out historically in the domestic violence and race discrimination contexts. *Id.* at 2121, 2134.

[5] It is important to note that these efforts are national and coordinated. This case not only presents the claims of one individual baker from Colorado; rather, the case is representative of a national anti-LGBT-rights movement. That movement is spearheaded by conservative Christian political factions, sometimes referred to as the Religious Right – an alliance of evangelical Protestant Christians and American Roman Catholics whose goal is to stop and reverse LGBT civil rights victories. *See generally* FREDERICK CLARKSON, POLITICAL RESEARCH ASSOC., WHEN EXEMPTION IS THE RULE: THE RELIGIOUS FREEDOM STRATEGY OF THE CHRISTIAN RIGHT 10-12 (2016), *available at* http://www.politicalresearch.org/wp-content/uploads/2016/01/When-Exemption-is-the-Rule-PRA-Report.pdf. Thus, this brief will use the term "Opponents" interchangeably with "Petitioners" to reflect the reality that this case is part of a much larger national effort by these conservative Christian political factions.

revamped narrative about the perception of the Opponents in America: Where the Opponents once used an attacking narrative that vilified LGBT people, today they invoke a modernized narrative of their own victimhood. They contend that enforcing antidiscrimination laws against Christian business owners in the same-sex wedding context is discrimination *against the Opponents*. The second tactic is the status-conduct argument: Denying wedding-related goods and services is *not* discrimination based on sexual orientation (status); rather, it is a rejection of *conduct* – marriage. Thus, they argue, there is no status-based discrimination, as prohibited by antidiscrimination laws. The status-conduct argument was used for many decades to justify the subordination of LGBT people. It has been revitalized in this case, and the Court should reject it.

ARGUMENT

I. What's Old is New Again: Opponents Attempt to Revive Rejected Arguments

A. The Early Years (1950s through 1970s): Expressly Homophobic Rhetoric, Expressly Homophobic Laws

The 1950s through the 1970s saw a virulently homophobic narrative emanating from Opponents.[6] It was an attacking narrative, grounded in Christianity,

[6] *See* Velte, *Fueling the Terrorist Fires*, *supra* note 2, at 1129-1132.

that characterized "homosexuals"[7] as prone to pedophilia, sick, and child molesters.[8] Public policy, laws, and regulations tracked this derogatory rhetoric.[9] During this time, for example, the federal government fired 5000 LGBT employees during the so-called "Lavender Scare."[10] Congress issued a report that contended LGBT people "engage in overt acts of perversion" and "lack the emotional stability of normal persons."[11] President Eisenhower banned LGBT people from federal employment.[12]

The modern-day LGBT-rights movement emerged with the 1969 Stonewall riots.[13] In response, Opponents

---

[7] "Homosexual" is a label "aggressively used by anti-LGBT-rights advocates to suggest that gay people are somehow diseased or psychologically/emotionally disordered." GLAAD Media Reference Guide – Terms to Avoid, GLAAD, *available at* http://www.glaad.org/reference/offensive. Most LGBT people and their allies prefer the term "same-sex" or "LGBT." *Id.*

[8] DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 47-48, 76-78 (1997).

[9] *See* Velte, *Fueling the Terrorist Fires*, *supra* note 2, at 1129-1132.

[10] *See* Susan Donaldson James, *Lavender Scare: U.S. Fired 5,000 Gays in 1953 'Witch Hunt'*, ABC NEWS (Mar. 5. 2012), *available at* http://abcnews.go.com/Health/lavender-scare-us-fired-thousands-gays-infamous-chapter/story?id=15848947.

[11] *See "Employment of Homosexuals and Other Sex Perverts in Government" (1950)*, FRONTLINE, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/assault/context/employment.html.

[12] *See A History of Gay Rights in America*, CBS NEWS, *available at* http://www.cbsnews.com/pictures/a-history-of-gay-rights-in-america/6/.

[13] *See This Day in History: 1969 The Stonewall Riot*, HISTORY.COM, *available at* http://www.history.com/this-day-in-history/the-stonewall-riot.

redoubled their efforts to demonize LGBT Americans. In the 1960s, Opponents repeatedly linked the LGBT rights movement with a propensity to commit sexual crimes; they suggested that the movement planned to place LGBT teachers in schools to sexually molest or force their "lifestyle" on schoolchildren.[14] In the 1970s, Anita Bryant successfully campaigned to repeal Dade County, Florida's sexual orientation antidiscrimination ordinance.[15] A cornerstone of her campaign was a claim that homosexuals would recruit children to molest them.[16] These anti-LGBT laws were buttressed by the criminalization of sodomy in all 50 states,[17] which bolstered the narrative that LGBT people were pathological, deviant, and criminals.

B. The Middle Years (1980 through 1992): Sodomy is Conduct Separate from Status

In 1986, this Court handed the LGBT community a devastating loss when it upheld Georgia's sodomy law

---

[14] HERMAN, *supra* note 8, at 48, 50. *See* Southern Poverty Law Center, *History of the Anti-Gay Movement Since 1977*, *available at* https://www.splcenter.org/fighting-hate/intelligence-report/2005/history-anti-gay-movement-1977.

[15] *See Anita Bryant and the Save Our Children Campaign*, GAY HISTORY, *available at* http://gayhistory4u.blogspot.com/2009/08/religious-right-has-been-on-attack.html.

[16] *Id.*

[17] *See* Getting Rid of Sodomy Laws, *available at* https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision.

in *Bowers v. Hardwick*.[18] The status-conduct argument was the primary argument, buttressed by arguments based in morality and religion. The State and its *amici* insisted that "homosexual sodomy" (conduct) was the *only* issue, resulting in an erasure of LGBT identity (status). The merits brief argued that the court of appeals, which struck down the statute, took an "*activity* which for hundreds of years . . . has been uniformly condemned as immoral, and labeled that activity as a fundamental liberty."[19] One *amicus* framed the issue as whether "the *practice* of sodomy play[s] the same . . . role to that served by monogamous marriage and family life. . . ."[20] Another concluded that sodomy was "an *activity* which has been traditionally condemned."[21]

The *Bowers* opinion also separated conduct from status, starting with its framing of the issue: "[W]hether the Federal Constitution confers a fundamental right upon homosexuals *to engage in sodomy*."[22] It infused its conduct-based analysis with morality, religion, and tradition, when it held that no characterization of the right to privacy "would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[23] The *Bowers* decision had devastating consequences for

---

[18] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[19] Brief of Petitioner, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667939 (emphasis added).

[20] Brief of the Rutherford Institute et al. as Amici Curiae Supporting Petitioner, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667943 (emphasis added).

[21] *Id.* (emphasis added).

[22] *Bowers*, 478 U.S. at 190 (emphasis added).

[23] *Id.* at 193.

LGBT people. Despite being a criminal law case, it was used in numerous civil cases to justify denying LGBT people protection from discrimination in housing,[24] employment,[25] the military,[26] and parenting.[27] The argument was that if the state could criminalize LGBT *conduct*, it was permissible to deny *status-based* protections in all contexts.[28]

C. The Marriage Equality Years (1993 through 2015): Children Take Center Stage

In the marriage equality fight, Opponents abandoned the status-conduct argument and replaced it with a child-centered rhetoric.[29] For example, in *In re*

---

[24] *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1558 (1993).

[25] *See Williams Institute, Chapter 5: The Legacy of State Laws, Policies, and Practices, 1945-Present*, at 5, *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/5_History.pdf (last visited Sept. 20, 2017).

[26] *See* Cain, *supra* note 24, at 1587.

[27] *Id.* at 1624-25.

[28] *See Williams Institute, Chapter 5*, *supra* note 25, at 5-2; *see also* Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 KY. L.J. 885, 896-97 (2000-2001).

[29] *See, e.g.*, Scott L. Cummings and Douglas NeJaime, *Lawyering for Marriage Equality*, 57 U.C.L.A. L. REV. 1235, 1308 (2010); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1182 (2012); Charles J. Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debates Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 864 (1998). This rhetorical shift likely resulted because Opponents were losing in the court of popular opinion when they

Marriage Cases,[30] Opponents emphasized procreation and child-rearing, describing the State's interest as promoting "responsible procreation" to ensure that children conceived through heterosexual intercourse "are raised by both of their biological parents in one household – the optimum setting for child rearing."[31] They alleged that same-sex parents harm children.[32] Similar arguments were made in *United States v.*

---

objected to marriage because it was *per se* unnatural; they thus needed a new angle to oppose marriage equality and children provided a powerful one. For example, a television advertisement during California's Proposition 8 campaign, which depicted a child coming home and saying she learned at school that a prince could marry a prince, is an example of this new rhetoric and was largely viewed as a turning point – in favor of Proposition 8 proponents – in that campaign. *See, e.g.*, Molly Ball, *The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality*, THE ATLANTIC (Dec. 11, 2012), *available at* https://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865//. The shift, as Opponents struggled to explain how allowing LGBT people to marry hurts heterosexual people, was clearly strategic and powerful, as is the modernized status-conduct narrative they deploy here.

[30] 183 P.3d 384 (Cal. 2008).

[31] Appellant Proposition 22 Legal Defense and Education Fund's Opening Brief, *In Re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. CPF-04-503943), 2005 WL 3955027, at *31.

[32] *Id.* at 31.

Windsor,[33] as well as in *Obergefell* and its consolidated cases.[34]

D. Today: Marriage is Separate from LGBT Status

In the two years since *Obergefell*, Opponents have moved the battle to a quest for exemptions from non-discrimination laws that prohibit sexual orientation discrimination. To set up the legal argument, they shifted both their rhetoric – positioning themselves as victims of secularism rather than their prior posturing as saviors of children and American morals and values – and their legal arguments – modernizing and retooling the status-conduct argument. This shift became

---

[33] 570 U.S. ___, 133 S. Ct. 2675 (2013). *See* Brief of Amicus Curiae Liberty Counsel, *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 390994, at *3-*4; Amicus Curiae Brief of Manhattan Declaration, *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 390995, at *1, *9; Brief Amicus Curiae of the Family Research Council, *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 315235, at *20.

[34] *See* Brief of Amicus Curiae State of Alabama, *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1534344, at *6; Brief of Amicus Curiae the Family Trust Foundation of Kentucky, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 3:13-cv-00750), 2014 WL 2154833, at *25-26 (emphasis in original); Amici Curiae Brief of Individual Tennessee Legislators, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 3:13-cv-01159), 2014 WL 2154837; Amicus Curiae Brief of Citizens for Community, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 1:13-cv-501), 2014 WL 1653834; Brief of Amicus Curiae Foundation for Moral Law, *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1519044, at *25-*26.

necessary because the older, child-based arguments were rejected by this Court in *Windsor* and *Obergefell*; Opponents must find new reasons to uphold an anti-LGBT status regime.[35] Put another way, because the child-based rhetoric is now "an older, socially contested idiom[,]"[36] Opponents must create "a newer, more socially acceptable idiom"[37] in which to situate their opposition to LGBT civil rights.

Opponents contend they are the victims of secularism – positioned as bigots and pariahs – then leverage that narrative to assert that they are not bigots at all because they are *not* discriminating based on sexual orientation. Instead, they are making a choice to reject *conduct* – marriage.[38] This modernized status-conduct argument has appeared in the lower courts;[39] Petitioners' and *amici*'s briefs thus are the latest iteration of nationwide arguments.

---

[35] Siegel, *supra* note 4, at 2179.

[36] *Id.*

[37] *Id.*

[38] *See, e.g.*, *Telescope Media Group v. Lindsey*, Case 0:16-cv-04094, at 42 (D. Minn. Dec. 6, 2016) (arguing application of anti-discrimination law to Christian-owned videography business would "stigmatize[] their very identity as social pariah").

[39] *See id.* at 8 (arguing denial of services for same-sex wedding is not discrimination based on sexual orientation); *see also, e.g.*, *Lexington Fayette Urban Cty. Hum. Rgts. Comm'n v. Hands on Originals, Inc.*, HRC #03-12-3135, 8-9 (Lexington-Fayette Hum. Rgts. Comm'n, Apr. 19, 2012) (arguing refusal to print Gay Pride shirts was not "because of the prospective customer's sexual orientation" but rather rejection of message that LGBT people should be "'proud' about engaging in homosexual behavior or same-sex relationships."); *Brush & Nib Studio, L.C. v. City of*

Petitioner acknowledges and accepts the Colorado Civil Rights Commission's finding that he refused to make a wedding cake for a gay wedding "'because of' [his] opposition to same-sex marriage, not because of [his] opposition to their sexual orientation."[40] He argues that he did "not categorically refuse to serve" Respondents; he "only declined to create a custom wedding cake that would celebrate their marriage."[41] *Amici* follow suit:

Phoenix, CV2016-052251 (Ariz. Sup. Ct. May 12, 2016) (arguing refusal of services for same-sex weddings is not sexual orientation discrimination but rather declining to support *act* of marriage); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (arguing refusal to photograph same-sex wedding was not sexual orientation discrimination but rather declination to send message about *act* of same-sex marriage); *State v. Arlene's Flowers*, 389 P.3d 543 (Wash. 2017) (arguing refusal to sell flowers for same-sex wedding was because of religious beliefs about marriage, rather than sexual orientation); Brief of Amici Curiae Legal Scholars in Support of Equality and Religious and Expressive Freedom in Support of Appellants, *Washington v. Arlene's Flowers*, 389 P.3d 543 (Wash. 2017) (No. 91615-2), 2016 WL 6126873, at *6 ("She is happy to serve gay and lesbian customers . . . She is simply religiously opposed to participating in a same-sex marriage by providing . . . [a] service."); Petitioners' Reply Brief, *Klein v. Oregon Bureau of Labor and Industries* (Nos. 44-14, 45-14) (Or. App. 2016), 2016 WL 8465675, at *8 (arguing refusal to make cake for same-sex wedding was not based on sexual orientation but on baker's religious beliefs about same-sex weddings).

[40] Brief for Petitioners, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, No. 16-111 (U.S. 2017), 2017 WL 3913762, at *13.

[41] *Id.* at *52-*53.

- "Mr. Phillips declined to prepare a wedding cake for . . . not because of their sexual orientation, but because of his religious beliefs. . . ."[42]
- "Petitioners do not, and have never, wished to discriminate against Respondents based on their sexual orientation."[43]
- "What is at issue in same-sex marriage is *conduct*, [not] discrimination based on sexual orientation *status*."[44]
- "Phillips' objection was to participating in . . . a wedding ceremony, as opposed to any concern about sexual orientation."[45]

As explained below, Petitioners are attempting to leverage the preservation-through-transformation dynamic: Preserving a measure of status hierarchy by transforming its rhetoric to one that is presented as devoid of bias and homophobia and instead grounded

---

[42] Brief of Amicus Curiae Liberty Counsel, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, No. 16-111 (U.S. 2017), 2017 WL 4005663, at *31.

[43] Brief of Amicus Curiae Christian Business Owners, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, No. 16-111 (U.S. 2017), 2017 WL 4005666, at *21.

[44] Brief of Amici Curiae Indiana Family Institute, Inc., Indiana Family Action, Inc., and The American Family Ass'n of Indiana, Inc., *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, No. 16-111 (U.S. 2017), 2017 WL 3913765, at *11, *14 (emphasis in original).

[45] Brief Amicus Curiae of the Beckett Fund for Religious Liberty in Support of Petitioners, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, No. 16-111 (U.S. 2017), 2017 WL 4004526, at *25.

in protecting Christian business owners through the revered principles of the First Amendment.

E. Opponents Are Attempting Preservation-Through-Transformation

Status regimes are dynamic, not static.[46] Even after a civil rights victory as significant as marriage equality, the status of LGBT people and couples can – and will – continue to be contested. Interrogating the narrative of this contestation reveals that it is merely a modern expression of an historical inequity.[47] Backlash, embodied in a modernized narrative, works to maintain status hierarchies. As a result, civil rights victories work to "breathe new life into a body of status law, by pressuring legal elites to translate it into a more contemporary, and less controversial, social idiom. . . . [T]his kind of change in the rules and rhetoric of a status regime [is] 'preservation through transformation.'"[48] Those seeking to reconstitute a now-discredited status regime must "reform the contested body of law sufficiently so that the regime that emerges from reform can be differentiated from its contested predecessor."[49]

The first iteration of the status-conduct argument, during the sodomy era, was accepted by courts. However, when LGBT people contested sodomy laws, the

---

[46] Siegel, *supra* note 4, at 2175.

[47] *See id.*

[48] *Id.*

[49] *Id.* at 2179.

status-conduct argument became a "controversial, social idiom."[50] After *Lawrence v. Texas*, Opponents were forced to rationalize their continued opposition in a rhetoric that could be "differentiated from a naked interest in preserving"[51] an anti-LGBT regime. They did so by shifting their narrative to "protecting children" during the marriage equality years. Today, they must again update their justifications for anti-LGBT discrimination, and they attempt to do so through the modernized status-conduct argument.

II. This Court Should Break the Preservation-Through-Transformation Dynamic

The Court should reject Opponents' subordinate status-conduct argument for three reasons: (1) legal precedent directs that outcome, (2) well-established concepts of identity undermine the notion that it is possible to separate conduct from sexual orientation, and (3) it is necessary to break the preservation-through-transformation dynamic in order to achieve meaningful formal equality for LGBT Americans.

---

[50] *Id.* at 2119.

[51] *Id.* at 2186.

A. This Court's Precedents Rejecting the Status-Conduct Distinction

Romer v. Evans[52] and *Lawrence*, considered together, reveal this Court's belief that LGBT status cannot be separated from LGBT conduct when analyzing antidiscrimination laws under the Constitution. In *Romer*, this Court struck down Colorado's Amendment 2; because it was grounded in anti-LGBT animus, as evidenced by the fact that it "identifie[d] persons by a single trait and then denie[d] them protection across the board," it violated the Equal Protection Clause.[53] Thus, *Romer* held laws that classify on the basis of sexual orientation *as a status* may be unconstitutional. In *Lawrence*, this Court ended the sodomy era when it declared Texas's sodomy law to be unconstitutional – holding that LGBT *conduct* is entitled to constitutional protection because the Due Process Clause gives LGBT people "the full right to engage in their conduct without intervention of the government."[54] Taken together, *Romer* and *Lawrence* establish that status and conduct cannot be disentangled when analyzing laws that classify based on sexual orientation.[55]

---

[52] 517 U.S. 620 (1996).

[53] *Id.* at 633.

[54] 539 U.S. 558, 578 (2003).

[55] Max Kanin, Christian Legal Society v. Martinez: *How an Obscure First Amendment Case Inadvertently and Unexpectedly Created a Significant Fourteenth Amendment Advance for LGBT Rights Advocates*, 19 AM. U.J. GENDER SOC. POL'Y & L. 1317, 1324-1325 (2011).

Moreover, *CLS v. Martinez*[56] compels rejection of the modernized status-conduct argument. *CLS* involved Hastings College of Law's antidiscrimination policy.[57] The policy was invoked to deny the Christian Legal Society official recognition as a student group, based on CLS's requirement that students seeking membership adopt a statement of faith that required any LGBT students seeking membership to disavow their "unrepentant homosexual conduct."[58] This Court upheld the application of the antidiscrimination policy to CLS, uniting its holdings in *Romer* and *Lawrence* to expressly recognize that LGBT status and conduct cannot be separated when considering antidiscrimination policies, laws, and the constitution.[59]

In *Windsor*, this Court acknowledged the link between LGBT status and the conduct of marriage.[60] Finally, *Obergefell* made clear that the essence of LGBT identity encompasses conduct.[61]

---

[56] 561 U.S. 661 (2010).

[57] 561 U.S. at 671.

[58] *Id.* at 672.

[59] *See* Kanin, *supra* note 55, at 1324-26; *see also CLS*, 561 U.S. at 689 ("Our decisions have declined to distinguish between status and conduct in this context.").

[60] 133 S. Ct. at 2692-93.

[61] 135 S. Ct. at 2596.

B. The Social-Identity Basis for Rejecting the Status-Conduct Distinction

Performing sexual orientation by engaging in a relationship is a highly salient characteristic of one's sexual orientation.[62] Sexual orientation (status) and conduct related to LGBT sexual orientation (same-sex intimacy, marriage, and the like) are "sufficiently central to gay identity that burdening such acts is tantamount to burdening gay status."[63] When LGBT people appear single, others can avoid visualizing the same-sex sexual conduct that largely defines that status of being LGBT.[64] Thus, conduct *is constitutive of* LGBT status; the two cannot be separated without stripping LGBT status (identity) of its core component.[65] While it is true that "an individual's sexual interests are internal,"[66] those interests are directed externally toward another person, thus rendering sexual orientation inherently relational;[67] relationships are conduct-based.[68] Accepting that LGBT status and conduct can

---

[62] *See* NeJamie, *supra* note 29, at 1196.

[63] Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 778 (2002).

[64] *Id.* at 847.

[65] *See generally* Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEXUALITY 1, 60-61 (2003).

[66] Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1286 (2006).

[67] *Id.*

[68] NeJaime, *Marriage Inequality*, *supra* note 29, at 1198. *See also* Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1650 (1993) ([A]lmost definitionally,

be separated would render antidiscrimination protections based on "status" useless.

The majority of the lower courts that have considered the question have agreed that this Court's LGBT jurisprudence directs that sexual orientation as a status and the conduct of marriage simply cannot be separated from each other.[69] This Court should confirm these lower court holdings and expressly reject the status-conduct argument once and for all.

---

coupling or the desire to couple must figure in same-sex orientation."); Janet E. Halley, *"Like Race" Arguments, in What's Left of Theory? New Work on the Politics of Literary Theory* 40, 41 (Judith Butler et al. eds., 2000) ("[I]t takes two women, or at least one woman and the imagination of another, to make a lesbian.").

[69] *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013), *cert. den.*, 134 S. Ct. 1787 (2014) (holding it is impossible and inappropriate "to distinguish between an individual's status of being homosexual and his or her conduct in openly committing to a person of the same sex."); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 281 (Colo. App. 2015) ("[W]hen the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status," the status-conduct distinction becomes one without a difference"); *State v. Arlene's Flowers*, 389 P.3d at 553 ("[W]e reject Stutzman's proposed distinction between status and conduct fundamentally linked to that status"); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (App. Div. 2016) ("The act of entering into a same-sex marriage is 'conduct that is inextricably tied to sexual orientation'"); *Barrett v. Fontbonne Acad.*, No. CV2014-751, 2015 WL 9682042, at *2 (Mass. Super. Dec. 16, 2015) (unpublished decision) (denying employment on the basis individual was in a same-sex marriage constituted sexual orientation discrimination).

C. This Court Should Break the Preservation-Through-Transformation Dynamic by Rejecting the Status-Conduct Distinction

If this Court fails to expose and reject Opponents' attempt at preservation-through-transformation, it will cooperate in naturalizing Opponents' modernized status regime as "just and reasonable"[70] by giving credence to (and placing the imprimatur of this Court upon) the subtextual message, embodied in the modernized status-conduct argument, that such argument is "formally and substantively distinguishable from its contested predecessor."[71] More specifically, the Court would be complicit in Opponents' effort to justify their modernized status regime by accepting the notion that the justificatory social values embodied in the current status-conduct argument are distinct from the "orthodox, hierarchy-based norms that characterized its predecessor"[72] (sodomy and expressly homophobic law) "as a regime of mastery."[73] This Court simply cannot take part in this effort to re-legitimize and reestablish an anti-LGBT regime such that it can "once again be justified as 'reasonable.'"[74] Thus, this Court should reject the modernized argument to break the preservation-through-transformation dynamic and create full formal equality for LGBT Americans. Groups that disagree with this Court's decisions cannot be permitted to

---

[70] Siegel, *supra* note 4, at 2184.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

undermine this Court's precedent by updating previously-rejected arguments.

CONCLUSION

History's lessons will be exposed in their most salient form by recognizing recurring patterns – like the modernization of the status-conduct argument. This Court should heed the lessons of history and precedent, embrace the reality of human identity, and definitively reject the status-conduct argument.

Respectfully submitted,

KYLE C. VELTE
Visiting Assistant Professor,
TEXAS TECH UNIVERSITY
SCHOOL OF LAW
3311 18th Street,
Box 40004
Lubbock, TX 79409
(806) 834-5470
kyle.velte@ttu.edu
Counsel of Record

BARBARA J. COX
Professor of Law,
CALIFORNIA WESTERN
SCHOOL OF LAW
225 Cedar Street
San Diego, CA 92101

List of personal and professional donors who made a monetary contribution for the printing of this *amicus* brief:

Jamie Baker
Amy Brady
Erin Collopy
Ginger Coplen
Beth Corbin
Michael Debnam
Jennifer Eyl
Frank and Salahuddin LLC
Jane Feldman
Amy Gestal
Julie Gold
DeLeith Gossett
Lisa Marsh
Kris McDaniel-Miccio
Joanna Stern McCleaf
Kevin McReynolds
Derek Mergele-Rust
Terry Miller
Sarah Mulkey
Alex Ray
Emily Reber-Mariniello
Melanie Richburg
Bryan Rust
Emma Shinn
Claire Soto
Abigail Swingen
Sarah Black Uhlar
Brian Uline
Robert and Ivy Velte
Sandy Woodson